DEPARTMENT OF JUSTICE

PROPOSED AMENDMENT

TO THE

NATIONAL SECURITY ACT OF 1947

October 8, 1981

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Office of the Attorney General
Washington, D. C. 20530

October __, 1981

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal, "To amend the National Security Act of 1947."

The proposal is part of the legislative program of the Department of Justice for the 97th Congress. The Office of Management and Budget has advised me that this legislation is in accord with the legislative program of the President. We urge the Congress to give this legislation its prompt and favorable consideration.

The proposed legislation, we believe, is necessary to deal with a serious and increasingly difficult problem facing the nation's most important and most sensitive intelligence agencies, the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency. Recent experience has only confirmed the incompatibility of the requirements of mandatory disclosure laws when applied to intelligence agencies whose work necessarily must be conducted in secret. As a consequence, these agencies have been required to bear severe administrative burdens, to risk the disclosure of sensitive information, and to suffer the loss of valuable foreign sources of information. Moreover, federal judges have been entrusted with the authority to second-guess the classification decisions of even these agencies, although one court has noted that "[f]ew judges have the skill or expertise to weigh the repercussions of disclosure of intelligence information." Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C. Cir. 1977).

In return for this prodigious dedication of manpower, and the resulting risks of disclosure and loss of foreign sources of information, the benefits to the American public have been few indeed. The permanent oversight process recently established by Congress now serves to monitor the activities of the intelligence agencies in a much more effective way than public disclosure laws ever could.

Accordingly, the Administration has determined that the application of mandatory disclosure laws is not appropriate with respect to the nation's key intelligence agencies. Although refinements to those laws certainly are appropriate to meet the circumstances of most federal agencies, the special needs and vulnerability of the intelligence agencies are simply incompatible with the concept of mandatory disclosure.

The security of the nation depends in significant part on the ability of our intelligence agencies to gather and analyze intelligence information. The proposed legislation is needed to allow these agencies the necessary latitude to develop foreign sources and gather foreign information. We look forward to working with Congress to achieve passage of this legislation.

Sincerely,

William French Smith

Enclosure

97th Congress
1st Session

A BILL

To amend the National Security Act of 1947.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title I of the National Security Act of 1947 (50 U.S.C. 401 et seq.) is amended by adding after section 103 the following new section:

"Sec. 104. The Central Intelligence Agency, the National Security Agency and the Defense Intelligence Agency, and any other agency or component thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities and which the President specifically designates by Executive Order, are exempt from the provisions of any law (other than properly applicable rules of judicial discovery) which require the publication or disclosure, or search or review in connection therewith, of records they create or maintain, except that any proper request for records under the Privacy Act of 1974, section 552a of title 5, United States Code, shall be unaffected by this section. The provisions of this section shall not be superseded except by a statute which is enacted after the date of enactment of this section and which specifically repeals or modifies the provisions of this section.".

SEC. 2. This Act shall apply to any disclosure after the date of enactment of this Act.

SECTION ANALYSIS

The draft bill would amend the National Security Act of 1947 to create an exemption from disclosure obligations for records maintained by the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, and other intelligence and counterintelligence agencies designated by the President.' The purpose of the draft bill is to relieve these agencies of the obligation to search for, review, and disclose documents held by them in order to safeguard the security of classified documents and other sensitive information and avoid unnecessary disruption of their intelligence operations. However, the draft bill would not affect properly applicable rules of judicial discovery or requests for information under the Privacy Act of 1974, 5 U.S.C. § 552a.

I. SECTION I OF THE DRAFT BILL -- AMENDMENT TO THE NATIONAL SECURITY ACT

Section 1 of the draft bill would add section 104, a new exemption provision, to the National Security Act of 1947.

A. Present Law

The Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency

presently are subject in full to the provisions of the Freedom of Information Act, 5 U.S.C. § 552. Just as any other agency, these agencies must provide any agency records upon request from any person, unless the agency can demonstrate that the records fall within one of the enumerated exemptions to disclosure in section 552(b).

Two of the exemptions are of particular importance to the intelligence agencies: exemption (b)(1), which protects information relating to national defense or foreign policy and properly classified pursuant to Executive Order; and exemption (b)(3), which protects information specifically exempted from disclosure by another statute.

Under exemption (b)(1), the intelligence agencies must demonstrate that the records sought to be withheld are properly classified under Executive Order.1/ The agencies bear the burden of proving that the records are properly classified, and the United States district courts are authorized to decide de novo whether the documents are in

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1/ The currently effective executive order relating the classification of national security information is Executive Order 12065.

fact properly classified.[2] Although the Statement of the Conference Committee on the 1974 amendments to the Freedom of Information Act indicated that the courts are to give "substantial weight" to the agency's classification decision,[3] the courts are free to decide for themselves whether the information is properly classified and to order disclosure even over the objections of the agency.[4]

Exemption (b)(3) of section 552 also authorizes witholding of information specifically exempted from disclosure by statute. Several such statutes apply to the intelligence agencies. Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." This statute has been held to be an exemption statute within the meaning of 5 U.S.C.

2/ 5 U.S.C. § 552(a)(4)(B). The accompanying draft bill to amend the Freedom of Information Act, section 5, would substitute the traditional Administrative Procedure Act standard of review for arbitrary or capricious action in place of the present de novo review for exemption (b)(1) claims.

3/ Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 229 (1975); see Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

4/ See Holy Spirit Association for the Unification of World Christianity v. Central Intelligence Agency, 636 F.2d 838, 845-46 (D.C. Cir. 1980).

§ 552(b)(3), but limited to the withholding of information whose release could lead to the disclosure of confidential sources and methods.5/ In addition, section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g, provides that "the [Central Intelligence] Agency shall be exempted from . . . the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or members of personnel employed by the Agency." This provision has been held to be limited to the withholding of information relating to agency personnel and structure, not to agency activities.6/

Even in the case of documents withheld as exempt, the intelligence agencies must be prepared to justify the withholding on a line-by-line basis, to provide a detailed index of withheld documents and the explanation for the withholding, and the explain the action to a court, either publicly or in camera.

5/ Phillippi v. Central Intelligence Agency, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976).

6/ Id. Section 6(a) of the National Security Agency Act of 1959, 50 U.S.C. § 402 note, provides a somewhat similar exemption for the National Security Agency which does extend to information concerning the activities of the Agency.

B. Reasons for change

The public disclosure requirements of 5 U.S.C. § 552 apply to all agencies and, to varying degrees, all agencies have experienced difficulties in administering the present provisions of that section. The accompanying draft bill to improve the Freedom of Information Act is an attempt to respond to the salient problems at most federal agencies.

As worthwhile as those proposed amendments are for other agencies, they do not and cannot address fully the special needs and vulnerability of the nation's key intelligence agencies. The Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency are among the nation's most sensitive intelligence agencies, and of necessity must conduct their operations in strict secrecy. Given their sensitivity, the application of a mandatory disclosure law necessarily imposes an incompatible obligation upon these agencies. The draft bill reflects the Administration's judgment that the appropriate resolution to this problem is to exempt these agencies from the incompatible public disclosure requirements of 5 U.S.C. § 552.

Each of the three agencies covered by the draft bill is an especially sensitive element of the nation's national defense and foreign policy intelligence

establishment. The Central Intelligence Agency is the leading agency in gathering intelligence and counter-intelligence information and conducting covert operations. Disclosure of information in its files could expose the identities and operations of its covert agents and sources, result in physical reprisals or intimidation against its agents and sources, and reveal intelligence decisions and priorities at the highest levels. The National Security Agency has two critical roles: to safeguard the security of vital United States communications ("communications security") and to acquire foreign intelligence information by intercepting foreign communications ("signals intelligence"). Disclosure of information gathered by the National Security Agency could render United States communications susceptible to foreign interception, enable foreign powers to adopt countermeasures to prevent interception of their communications, or disclose the Agency's technical ability to intercept and interpret particular foreign communications and channels. The Defense Intelligence Agency operates at the highest levels of collecting, processing, and analyzing foreign intelligence relating to national security for the Secretary of Defense and the Joint Chiefs of Staff. An important aspect of the Defense Intelligence Agency's intelligence operations is the Defense Attache System. Because of particularly sensitive nature of the Attache's diplomatic status, information gathered by him must be carefully

guarded to prevent diplomatic reprisals or loss of access to further information. In addition, other components of the nation's national defense and foreign policy intelligence establishment operate at a level of sensitivity equal to that of these three intelligence agencies.

The experience of these key intelligence agencies in complying with mandatory disclosure requirements has made clear the inevitable problems that arise. The most immediate problem is the exceptional burden that the processing of information requests places upon the intelligence agencies. By necessity, these agencies operate on an extremely decentralized basis, with access to information allowed only to those with a "need to know." These agencies cannot operate a central office of professional disclosure personnel as other agencies do. Moreover, because of the extreme sensitivity of the information held by these agencies and the difficulty of accurately measuring the potential for harm in releasing particular bits of information, the review of agency documents must be conducted by high level, experienced intelligence officers familiar with the particular documents and the agency's operations. This necessarily diverts them from their assigned intelligence activities.

For an intelligence agency, the processing of requests and the releasing of information poses a constant risk of disclosing highly sensitive information. This risk cannot be avoided by the existing exemptions from disclosure for certain types of information. The requirement to review and possibly release each document on a line-by-line basis always raises the risk of inadvertent release of sensitive information. Even more threatening is the ability of foreign intelligence operations to piece together disparate, seemingly non-sensitive data in order to deduce important information about American intelligence operations. Because the three agencies have been required to release ever-increasing amounts of information publicly in order to establish the applicability of an exemption for particular information in court, the danger that these releases will lead to the discovery and exposure of other highly sensitive information is becoming ever greater. For example, the disclosure of even fragmentary information by the National Security Agency could, when pieced together with other bits of information, alert a foreign power to the Agency's ability to monitor a particular channel.

The process of judicial review also heightens the danger of inadvertent release of highly sensitive information. Although most courts have respected these agencies'

expertise in intelligence matters,[7] in at least one case the courts have ordered disclosure of classified information over the objection of the intelligence agency[8] and in two other cases the court's disclosure order was reversed only on appeal or on reconsideration.[9] The authority of the courts to review and overrule the classification decisions by these sensitive agencies is anomalous because, as the United States Court of Appeals for the District of Columbia Circuit has noted, "[f]ew judges have the skill or experience to weigh the reprecussions of disclosure of intelligence information."[10] Yet the existence of that authority means that the Central Intelligence Agency, the National Security Agency, and the Defense

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7/ See, e.g., Halperin v. Central Intelligence Agency, 629 F.2d 144, 148 (D.C. Cir. 1980); Hayden v. Central Intelligence Agency, 608 F.2d 1381, 1388 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C. Cir. 1977).

8/ Holy Spirit Association for the Unification of World Christianity v. Central Intelligence Agency, 636 F.2d 838, 845-46 (D.C. Cir. 1980).

9/ Weberman v. National Security Agency, 480 F. Supp. 9 (S.D.N.Y. 1980) (ordering disclosure), rev'd per curiam, No. 80-6155 (2d Cir. Dec. 18, 1980), on remand, 507 F. Supp. 117 (S.D.N.Y. 1981), No. 77 Civ. 5058 (CLB) (S.D.N.Y. June 5, 1981) (denying disclosure); Baez v. National Security Agency, Civ. No. 76-1921 (D.D.C. Nov. 2, 1978) (ordering disclosure of classified affidavit), on reconsideration, (D.D.C. July 17, 1980) (vacating disclosure order).

10/ Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C. Cir. 1977).

Intelligence Agency cannot be certain of the security of even their most sensitive information. Even if the court does not order disclosure, the requirement that the agencies index their documents and create highly sensitive affidavits putting into context and explaining the applicability of an exemption to particular documents raises the serious potential for breaches of security. An in camera affidavit may be significantly more sensitive than the particular document sought to be withheld,11/ yet these affidavits in some cases have been read not only by judges but by law clerks and other unauthorized personnel.

As a result of the administrative and judicial processes under 5 U.S.C. § 552, the key intelligence agencies have faced increasing difficulty in gathering crucial foreign intelligence. The widely held belief that, because of mandatory disclosure requirements, these agencies cannot assure the confidentiality of information gathered and of sources who provide that information has led many foreign sources and potential sources to refuse to cooperate with American intelligence operations. Many individuals who cooperate with these agencies do so at

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11/ For example, an affidavit explaining the sensitivity of information obtained by the National Security Agency may reveal not only the existence of particular information in the Agency's files but its method of gathering this information and the ability to intercept particular channels.

great personal risk, and the susceptibility of intelligence files to search and review, and possible disclosure, is a strong deterrent to their willingness to continue providing valuable intelligence.

Each of the intelligence services has encountered numerous instances in which individuals have refused to cooperate, diminished their level of cooperation, or completely discontinued confidential relations with the intelligence agencies because they believed their identity might be revealed through the Act. Even foreign intelligence services have registered strong reservations about full cooperation with American intelligence agencies as long as their operations are subject to the Freedom of Information Act. Those perceptions are having a very real and very serious impact on these agencies' abilities to gather vital intelligence. This result is particularly detrimental at a time when the nation's need for accurate foreign intelligence is as great as if not greater than ever.

For these reasons, the application of the Freedom of Information Act has had a serious and detrimental impact upon the nation's intelligence efforts. In return, the applicaton of mandatory disclosure requirements has resulted in the release of very little information from the records of the key intelligence agencies. The information

disclosed generally has been extremely fragmentary and has related to subject matter originally revealed by other means.

In order to maintain a check on the activities of the key intelligence agencies, the Congress has established a formal oversight process to subject these agencies to continuing scrutiny and review of their operations.12/ This system of vigilant Congressional oversight can assure that the intelligence agencies act in accordance with legal requirements. The public disclosure requirements of 5 U.S.C. § 552, always unsuited to the special characteristics of the intelligence agencies, are simply not a necessary or effectual tool for the purpose of oversight -- if they ever were.

C. Explanation of Amendment

Section 1 of the draft bill would remedy the shortcomings of the present applicability of the Freedom of Information Act by providing a new exemptive provision, as part of the National Security Act of 1947, for the records of the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency. In conjunction with subsection (b)(3) of 5 U.S.C. § 552, the

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12/ See section 501 of the National Security Act of 1947, as amended, 50 U.S.C. § 413.

amendment made by the draft bill would exempt these agencies from the obligation to publish or disclose their records, or to search or review them in connection therewith. Only an exemption from disclosure framed in this way is broad enough to assure the security of these intelligence agencies' highly sensitive information.

In addition to the three specified agencies, the draft bill would authorize the President, by executive order, to designate other agencies or units thereof as exempted from mandatory disclosure laws. This provision is intended to address the situation where a particular organization, such a component of the National Security Council or the military intelligence agencies, is operatng at such a level in intelligence or counterintelligence activities that protection against disclosure equivalent to that accorded the Central Intelligence Agency is warranted. The provision would require a specific designation by the President in an Executive Order addressed to this issue.13/

13/ Executive Order 12036, which presently governs United States intelligence activities, contains a definition of the "Intelligence Community," for purposes of that Order, in section 4-207. The proposed amendment to the National Security Act made by the draft bill would require a specific designation of agencies or components thereof for purposes of the exemption from disclosure, and so the definition in section 4-207 of Executive Order 12036 would not be controlling for purposes of exemption from disclosure. A separate, specific executive order would be required to exempt agencies other than the three agencies [illegible] exempted.

The exemption from disclosure is specifically limited in two respects. First, the amendment made by the draft bill would have no effect on properly applicable rules of judicial discovery, in litigation by or against the agencies subject to the amendment. Second, the amendment made by the draft bill would have no effect upon any proper request for records under the Privacy Act of 1974, 5 U.S.C. § 552a. The agencies would still be subject to requests by individuals for records concerning themselves under that provision.14/ Moreover, nothing in the draft bill would affect the Congressional oversight process provided for in section 501 of the National Security Act of 1947, as amended, 50 U.S.C. § 413.

The draft bill also includes a provision relating to the construction of the exemption from disclosure proposed to be enacted as section 104 of the National Security Act of 1947. According to this provision, the exemption provided in section 104 would continue to apply unless specifically repealed or modified by subsequent legislation. The purpose of this provision is to provide a clear rule of construction, in order to avoid the issue of an implied repeal by subsequent enactments or judicial

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14/ Although the Privacy Act of 1974, 5 U.S.C. § 552a(j), already authorizes the Central Intelligence Agency to exempt any system of records held by it from disclosure, the Agency has adopted only a limited exemption for national security and other specified types of information. See 32 C.F.R. Part 1901. The Director of Central Intelligence has expressly stated that the Central Intelligence Agency does not intend to use this [illegible]

uncertainty in construing this provision. This provision does not preclude a subsequent repeal or amendment of proposed section 104, but requires that the repeal or amendment be made with specificity.

II. SECTION 2 OF THE DRAFT BILL -- EFFECTIVE DATE

Section 2 of the draft bill provides that the amendment to the National Security Act made by section 1 of the draft bill would apply to any disclosure after the date of enactment of the bill. Thus, the exemption would apply in all cases in which records had not yet been disclosed by an agency. This would include requests for records made after the effective date of the bill, requests made prior to the effective date of the bill that had not yet resulted in the disclosure of records, and requests that are the subject of litigation in the courts of the United States in which disclosure had not yet been made in response to a court order.

The effective date of the bill is patterned after another exemption statute recently enacted by Congress in section 701 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 340, Aug. 13, 1981. In that case, several requesters sought disclosure of the standards used for the selection of income tax returns for auditing, and the issue was being litigated in the courts. Section 701

of that Act provided an exemption from disclosure for such information, which "shall apply to disclosures after July 19, 1981," even though the Act was not approved until August 13, 1981. The effect of that provision was to create an exemption on a retroactive basis that would apply to all cases, whether the subject of pending litigation or not.

The draft bill would accomplish a similar purpose, ~~except that the exemption created by section 1 of the draft bill would apply only prospectively to all requests and cases in which disclosure had not yet been made.~~